Supreme Court, U.S.
FILED
OCT 8 1999
OFFICE OF THE CLERK

No. 99-417

IN THE

Supreme Court of the United States

LAWRENCE EPSTEIN, *et al.*,

Petitioners,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondent Matsushita Electric Industrial Co., Ltd. hereby states that it has no parent corporation and that no publicly held company owns 10% or more of its stock. Respondent Matsushita Holding Corp. hereby states that it is controlled by Matsushita Electric Industrial Co., Ltd. and that no other publicly held company owns 10% or more of its stock.

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Respondents Matsushita Electric Industrial Co., Ltd. and Matsushita Holding Corp. (collectively, "Matsushita") respectfully submit this brief in opposition to the petition for a writ of certiorari which seeks review of a June 7, 1999 decision of the United States Court of Appeals for the Ninth Circuit. That decision is reported at 179 F.3d 641 (9th Cir. 1999) and set forth in petitioners' appendix at App. 1a-31a. Petitioners' appendix did not include this Court's prior decision in this action. This Court's decision is reported at 516 U.S. 367 (1996) and set forth in respondents' appendix ("Resp't App.") at 1a-38a.

STATEMENT OF THE CASE

Petitioners have failed to meet their burden of demonstrating that a "compelling reason" exists for this Court to review this nine-year old case a *second* time. Sup. Ct. R. 10. Every issue raised in the petition has been (1) previously addressed in this Court's 1996 decision in this action and (2) adjudicated by the Delaware Chancery Court and Delaware Supreme Court in entering judgment upon the class action settlement at issue. The petition presents fact-intensive contentions that do not warrant another review because they involve highly unusual circumstances that are unlikely to recur. *See* App. 82a (Ninth Circuit observation in now-withdrawn 1997 opinion that this case presents "rare" circumstances and a "paucity of such cases is to be expected"); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari ordinarily will be denied if the case involves circumstances or issues which are unlikely to be repeated).

The Ninth Circuit's decision on remand simply implements this Court's ruling in this action, is consistent

with relevant precedent from this Court and other circuits, and presents no important federal question that should be resolved by this Court. *See* Sup. Ct. R. 10(a).

In *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), this Court reversed the Ninth Circuit's 1995 decision that a Delaware class action judgment was not entitled to full faith and credit. After reviewing Delaware preclusion law and the factual record in the Delaware Chancery Court and the Delaware Supreme Court, this Court: (1) concluded that the Delaware courts possessed proper jurisdiction over the class action settlement, (2) held that the Delaware courts adjudicated the adequacy of representation issue petitioners seek to relitigate here, (3) found as a matter of Delaware law that "a Delaware court would afford preclusive effect to the settlement judgment in this case," and (4) held that because they chose not to opt out, petitioners "are bound, then, by the judgment" of the Delaware courts. *Matsushita*, Resp't App. at 12a-13a. The Ninth Circuit's decision enforces this Court's ruling by withdrawing a prior panel's decision on remand that effectively reinstated — by a two to one vote — the Ninth Circuit's 1995 decision which this Court had reversed.

Renewing an argument advanced before this Court in *Matsushita*, petitioners invite this Court on collateral review to find constitutional infirmity in the Delaware proceedings based on alleged inadequate representation. But as the most recent opinion of the Ninth Circuit correctly recognizes, "*Matsushita*'s holding was explicitly and implicitly premised upon the validity of the Delaware judgment." App. 8a. This Court specifically recognized that (1) the Delaware Chancery Court made an "express ruling, following argument on the issue, that the class representatives fairly and adequately

protected the interests of the class," and (2) "the Court of Chancery *found*, and the Delaware Supreme Court affirmed," that the requirements of due process were satisfied. *Matsushita*, Resp't App. 12a-13a & n.5 (emphasis added). And, as the Ninth Circuit stated, this "Court further noted that under Delaware law, a state court settlement of a class action could release or preclude claims only where that settlement was 'determined to be fair and to have met all due process requirements.' " App. 9a (quoting *Matsushita*, Resp't App. 11a). Petitioners know that adequacy of representation was fully litigated and decided because their counsel drafted objections to the adequacy of representation for another class member to present in Delaware. Resp't App. 46a.

Acknowledging that the Ninth Circuit's now-withdrawn decision on remand "did not give sufficient weight to these admonitions," Judge Wiggins' concurrence summarizes the consequence of the Delaware courts' determinations under principles of full faith and credit and issue preclusion:

> Because the adequacy of representation issue was fully and fairly litigated in the Chancery Court, the Delaware courts would give preclusive effect to that determination. . . . The Full Faith and Credit Act, 28 U.S.C. § 1738, requires that we "treat a state court judgment with the same respect that it would receive in the courts of the rendering state."

App. 22a (Wiggins, J., concurring) (quoting *Matsushita*, Resp't App. 5a-6a) (citation omitted).

There is no authority or policy that would permit a collateral attack based on allegedly inadequate representation

when, as this Court noted in *Matsushita*, Resp't App. 12a-13a, the class members were afforded notice, an opportunity to object or opt out, and the issue of adequacy of representation was actually litigated and resolved in state court. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982) ("state proceedings need do no more than satisfy the minimal procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law"). Petitioners do not cite any case that even remotely supports *de novo* relitigation of a state court's adequacy determination in a federal court; instead, they rely on inapposite decisions concerning direct appeals. While petitioners now seek to manufacture an inconsistency between *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and the Ninth Circuit's decision, they previously acknowledged in the Ninth Circuit that "*Shutts said nothing about collateral attack* on class actions for want of due process, including adequacy of representation." Plaintiffs-Appellants' Opening Brief on Class Action Issues at 41 (May 2, 1996) (emphasis added).

With actual notice of the proposed settlement and of the fairness hearing, petitioners sat out proceedings that determined the adequacy of representation while feeding arguments to objectors. This Court and the Delaware Supreme Court have held that under these circumstances petitioners have no "constitutional right" to collaterally attack the final class action judgment.

REASONS FOR DENYING THE WRIT

PETITIONERS PRESENT NO ISSUE WARRANTING A SECOND REVIEW BY THIS COURT

A. The Ninth Circuit's Decision Simply Implements This Court's Decision In This Action

In *Matsushita*, this Court held that "a Delaware court would afford preclusive effect to the settlement judgment in this case." Resp't App. 12a. The Full Faith and Credit Act "directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Id.* at 5a-6a. This Court observed that petitioners "do not deny that, as shareholders of MCA's common stock, they were part of the plaintiff class and that they never opted out." *Id.* at 13a. As a result, this Court held that petitioners "are bound, then, by the judgment." *Id.*

The Ninth Circuit's June 7, 1999 decision implements this Court's decision:

> [I]n *Matsushita*, any resolution of the preclusive effect to be afforded under Delaware law to the Delaware judgment necessarily entailed a determination of whether the judgment was "constitutionally infirm." If the judgment were constitutionally infirm, the judgment could not be binding under Delaware law, nor could a federal court accord it full faith and credit. *The Supreme Court's holding in Matsushita that under Delaware law the Epstein appellants were "bound, then, by the judgment," was thus necessarily premised upon the constitutional validity of the Delaware judgment.*

App. 11a (citation omitted) (emphasis added). The Ninth Circuit's decision properly acknowledges that compliance with due process was a necessary predicate for this Court's conclusion that a Delaware court would afford preclusive effect to the Delaware judgment. *See Prezant v. De Angelis*, 636 A.2d 915, 923 (Del. 1994) ("[T]his constitutional requirement [of adequate representation] is embodied in [Delaware] Rule 23(a)(4), which requires that the named plaintiff 'fairly and adequately protect the interests of the class.' "); *Hynson v. Drummond Coal Co.*, No. Civ. A. 7904-NC, 1997 WL 741507, at *1 (Del. Ch. Nov. 24, 1997) ("Class members are bound by a judgment only if their due process rights were protected.").[1]

Petitioners' grievances raise questions of fact previously litigated and decided in Delaware. The cornerstone of the petition is the inaccurate factual contention that "the Delaware court approved a class settlement without making *any* inquiry into adequacy of representation." Pet. at 10 (emphasis added). But as this Court specifically noted,

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1. As this Court previously observed, petitioners received notice of the Delaware proceedings, including their right to request exclusion from the settlement class and to object to the fairness of the settlement. *Matsushita*, Resp't App. 3a. Petitioners, however, chose not to opt out or object; instead, their lawyers drafted objections to the adequacy of representation for another class member to present in Delaware. Resp't App. 46a. As petitioners concede, *see* Pet. at 3, class members did, in fact, challenge both the adequacy of representation and the fairness of the settlement. The Delaware Chancery Court and the Delaware Supreme Court considered these issues, approved the class settlement, and entered a judgment releasing all claims. No class member, including petitioners, sought review under Delaware Chancery Rule 60(b) or in this Court under 28 U.S.C. § 1257. *See generally Matsushita*, Resp't App. 4a-5a.

petitioners previously asserted this claim "in spite of the Chancery Court's express ruling, following argument on the issue, that the class representatives fairly and adequately protected the interests of the class." *Matsushita*, Resp't App. 12a-13a n.5. Indeed, petitioners — through surrogate objectors — directly raised the adequacy of representation issue at the Delaware settlement hearing. As Judge Wiggins observed:

> One of the objectors, William Krupman, explicitly opposed the proposed settlement because "the purported class representatives . . . had proposed a settlement that benefitted no one but their attorneys. *They did not provide adequate representation to the class.*"

App. 21a-22a (quoting Affidavit of William A. Krupman at 2-3, *In re MCA, Inc. Shareholders Litig.*, Civ. A. No. 11740, 1993 WL 43024 (Del. Ch. Feb. 16, 1993)) (emphasis added by Wiggins, J.). Petitioners' counsel wrote the first draft of Mr. Krupman's objection. Resp't App. 46a.

The Delaware Chancery Court considered Mr. Krupman's objection and a "similar" objection by Pamela Minton de Ruiz, but approved the class action settlement because it found "the class representation adequate and the settlement fair." *Matsushita*, Resp't App. 3a; *see also* App. 22a (Wiggins, J.). The Delaware Supreme Court affirmed the vice chancellor's order, which, as petitioners concede, Pet. at 15, "recited that there was adequate representation." *See Matsushita*, Resp't App. 4a.[2]

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2. Petitioners' fact-intensive contention that the settlement was unfair because it undervalued the federal claims fails to recognize (Cont'd)

Ignoring these findings, petitioners argue that they are not bound by the Delaware judgment because "[o]bjectors are objectors, not class representatives." Pet. at 20. But if, as petitioners suggest, each class member is free to collaterally challenge a final judgment, there is no "class suit" — except one that is "one way" (*i.e.*, binding on the opposing party but not on the class). Moreover, petitioners misapprehend the source of the binding authority: it is the court's *determination* of the issues before it that binds the absent class members, not the identity of the party raising the argument. *See Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560-61 (3d Cir.), *cert. denied*, 513 U.S. 986 (1994). When an objector contests the adequacy of representation, with the absent class members' authorized representative participating on behalf of the class, absent class members are bound by any judgment properly rendered by the issuing court. *See, e.g., Williams v. General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 275 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 2392 (1999). This is particularly true of petitioners, who were virtual objectors because their alter ego made their arguments. As both this Court and the Ninth Circuit have held, petitioners' arguments concerning the adequacy of representation were made, listened to, and rejected.

(Cont'd)
that the settlement was reached *after* the federal district court had denied class certification and dismissed the case, *see* App. 6a, therefore making it logical to assign minimal value to those claims. Moreover, the Delaware Supreme Court is the "ultimate authority on matters of Delaware law," including the fairness of a settlement and the res judicata effect of settlement judgments. *See* App. 9a n.2 (citing *Matsushita*, Resp't App. 14a).

B. The Ninth Circuit's Decision Is Consistent With Precedent From This Court And Decisions From Other Circuit Courts Of Appeal

1. Kremer *Properly Defines The Limits Of Collateral Attack*

Under the guise of a due process challenge, petitioners seek to create a federal role in second guessing a state court finding of adequate representation in an opt-out class action settlement. But this Court has already thoroughly addressed the scope of permissible collateral attack on state court proceedings. In reviewing a state court judgment on collateral attack, a federal court may consider only whether the state court proceedings "satisf[ied] the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982). Under this clear standard — which this Court found applicable here, *see Matsushita*, Resp't App. 6a — a federal court is to consider only whether the state court *procedures* are adequate to ensure that the parties have a full and fair opportunity to litigate their claims; it does not permit a *de novo* review of the underlying facts or the merits of the adequacy of representation question itself.

Petitioners now assert that the Delaware judgment is not entitled to full faith and credit under *Kremer* because the Delaware procedures were, as a matter of fact, "fundamentally flawed." Pet. at 10. The petition, however, ignores this Court's findings that the procedures employed by the Delaware courts comported with due process. *See Matsushita*, Resp't App. 12a-13a. Indeed, this Court expressly recognized that the Delaware proceedings conformed with Delaware Chancery Rule 23, which is

substantially identical to Federal Rule of Civil Procedure 23. *Matsushita*, Resp't App. 12a-13a. And, it is well settled that Delaware Chancery Rule 23 and Federal Rule of Civil Procedure 23 codify the requirements of due process in class actions. *See id.* at 12a-13a n.5; *see also id.* at 34a (Ginsburg, J., concurring in part, dissenting in part) ("In Delaware, the constitutional due process requirement of adequate representation is embodied in Delaware Court of Chancery's Rule 23.").[3]

Petitioners then argue that they are entitled to a *de novo* review of the Delaware courts' findings because the class representatives had "no power to assert in any court" the federal claims at issue here. Pet. at 18. As an initial matter, this argument (which petitioners previously raised in this Court) is foreclosed by this Court's ruling in *Matsushita* that state court class representatives may release exclusively federal claims even though they cannot litigate them. Resp't App. 10a-11a. More importantly, *Kremer* prohibits a federal court on collateral review from conducting the kind of fact-sifting second guessing petitioners seek, where, as here, the minimal procedural requirements of due process were satisfied. *See Kremer*, 456 U.S. at 481-82.[4]

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3. Petitioners mischaracterize the Ninth Circuit's decision as holding that "[s]o long as the state has the functional equivalent of Rule 23, absent class members are bound by the class action judgment no matter how inadequate the representation." Pet. at 6, 11. The Ninth Circuit's decision does not conclude that the existence of Rule 23 was sufficient to bind class members — rather, it was the existence of Rule 23 together with the fact that "the Delaware Chancery Court made the requisite findings." App. 15a n.6 (citing *Matsushita*, Resp't App. 12a-13a).

4. Seeking to relitigate factual determinations made in Delaware, petitioners contend that there is no evidence that the class (Cont'd)

The *de novo* review standard on collateral attack sought by petitioners also would endanger the finality and utility of *all* class action settlements. *See* App. 15a (petitioners' theory would allow every class plaintiff a "largely unfettered right to challenge collaterally the adequacy of representation in class actions"); *Hynson*, 1997 WL 741507, at *1 (noting that an unfettered right to collaterally attack on due process grounds "would seriously undermine the utility of class actions"). Moreover, petitioners' suggestion that a federal court sitting in collateral review should be able to second guess a state court finding of adequacy collides with basic principles of federalism and "this Court's emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *Allen v. McCurry*, 449 U.S. 90, 105 (1980).[5] In short "the absent class members' due process right

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representatives "were even members of the class, or that they held any federal claims that were not barred by the statute of limitations." Pet. at 15. The amended Delaware class action complaint filed on December 14, 1990 specifically alleged, however, that the named plaintiffs were current owners of MCA common stock, which fits them squarely within the class definition, and this contention was uncontested. Resp't App. 50a-51a. The Delaware Chancery Court also specifically found that all the requirements of Rule 23(a) had been satisfied (which includes a requirement that the representatives have claims typical of the class) and that the representatives fairly and adequately represented the class members' interests. Resp't App. 40a.

5. The Ninth Circuit does not and cannot sit in direct review of the Delaware Supreme Court. *See Asarco Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923); *see also Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 512 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court." App. 16a. Petitioners chose to forgo these safeguards.

2. *Cases Cited By Petitioners In Which Absent Class Members Had No Opportunity To Appear, And Which Do Not Implicate The Full Faith And Credit Act Are, On Their Face, Inapplicable*

Attempting to manufacture a federal issue for review, petitioners allege that the Ninth Circuit's decision is in "direct conflict with an unbroken wall of authority in this Court from *Hansberry v. Lee* on down through *Amchem Products* and *Ortiz v. Fibreboard*." Pet. at 12. But the procedural due process concerns this Court addressed in *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996), are not implicated here where it is undisputed that class representatives were approved pursuant to Delaware Rule 23 and that class members received notice, an opportunity to object, and the right to opt out. *See Hansberry*, 311 U.S. at 44 (finding that absent parties, who had no notice or opportunity to participate in a prior litigation, could not be bound where their alleged representatives had an actual conflict with the absent class members' interest); *Richards*, 517 U.S. at 802 (finding that a judgment in a prior non-representative action is not binding on individuals who "neither participated in, nor had the opportunity to participate in," the prior action) (internal citation omitted); *see also Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 329 (1971) (citing *Hansberry* for the proposition that litigants who "never had a chance to present their

evidence and arguments" in a prior action may not be bound by a prior judgment). Petitioners' reliance on this Court's decisions in *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), is similarly misplaced because both involved direct appeals of class action settlements. Neither implicated the Full Faith and Credit Act or a collateral attack on a judgment.[6]

Petitioners' assertion that the Ninth Circuit's decision conflicts with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), is entirely without merit. According to petitioners, *Shutts* stands for the proposition that class members are "free to sit it out" — *i.e.*, accept a state court settlement — and then at some indeterminate time thereafter launch a collateral attack. Pet. at 9-10. But as petitioners have previously conceded, *Shutts* says nothing about collateral attack. In *Shutts*, this Court held that the due process standard for asserting jurisdiction over absent class action plaintiffs is significantly lower than that for absent defendants because, among other reasons, plaintiffs are subjected to fewer burdens. 472 U.S. at 808-11. This Court explained that

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6. The lower court cases cited by petitioners are entirely inapposite. *See, e.g., In re "Agent Orange" Prod. Liability Litig.*, 996 F.2d 1425, 1428 (2d Cir. 1993) (rejecting on *direct appeal* a due process challenge to a settlement judgment even though parties seeking review did not know, at the time that the class action settlement was reached, they were members of the class); *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 765 (3d Cir. 1989) (holding on *direct appeal* that parties without minimum contacts with the forum are not bound by a *non-opt out* class action judgment); *Gonzales v. Cassidy*, 474 F.2d 67, 76 (5th Cir. 1973) (finding that a class representative's abandonment of an appeal once he obtained individual relief — even though other class members had not been granted relief — rendered the class representative inadequate in a *non-opt out* class action).

"[u]nlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Id.* at 810. Petitioners wrest this sentence out of context to assert that absent class members may simply do "nothing," and having done nothing, subsequently attack in another forum the very safeguards referred to in *Shutts* — adequacy of representation and court scrutiny of the settlement. To the contrary, *Shutts* makes clear that class members who fail to opt out are bound by the outcome of the class action. *Id.* at 813 ("the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so").

Shutts indicates that where a state court has provided the minimum procedural safeguards for asserting jurisdiction over a class action and made a finding that the safeguards were followed, any judgment rendered in the class action is *res judicata* against all members of the class. *Id.* at 805. As noted by this Court in *Matsushita*, each of the procedural safeguards identified in *Shutts* was provided for by Delaware law and followed by the Court of Chancery. Resp't App. 12a-13a. Consequently, as this Court previously held, class members are bound by the judgment. *Id.* at 13a.[7]

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7. Petitioners' assertion that the Ninth Circuit's decision effectively forces absent class members to hire counsel and actively monitor every class action proceeding in which they have an interest (Pet. at 14-15) ignores the option available to these class members — the right to opt out. In fact, courts have held that where a party

(Cont'd)

3. *The Ninth Circuit's Decision Is Consistent With Decisions From Other Circuit Courts Of Appeal*

Petitioners erroneously suggest that the Ninth Circuit's decision creates a split among the Courts of Appeal. The Ninth Circuit's decision, in fact, accords with the decisions of every Court of Appeals that has addressed a collateral challenge to adequacy of representation in a state court class action. *See* Sup. Ct. R. 10(a); *Grimes*, 17 F.3d at 1558 (finding that a Delaware state court's determination that a *non*-opt-out class received adequate representation is binding on class members and refusing to allow class members "to relitigate the issue of whether they were adequately represented during the settlement negotiations"); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991) (finding that parties to a Delaware state class action were precluded from collaterally attacking the Delaware court judgment); *cf. In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liability Litig.*, 134 F.3d 133, 142 (3d Cir. 1998) (refusing to enjoin class action settlement that is final and valid under Louisiana law). There is no Circuit Court conflict for this Court to address.

(Cont'd)
knows the terms of the settlement, and chooses not to opt out, the party cannot later attack the judgment. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993), *cert. denied*, 512 U.S. 1220 (1994) (class member who receives notice of the terms of a proposed settlement and chooses not to opt out of the class cannot subsequently attack the approved settlement on the ground of inadequate representation).

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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